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No. [illegible]

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G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT SAN ANTONIO, TEXAS, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT SAN ANTONIO, TEXAS.

To the Supreme Court of the United States and the Honorable Judges Thereof:

The Petitioners, G. J. Lucchese, H. H. Theis, and E. H. Maddox, respectfully petition this Honorable Court for a Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, for the reasons hereinafter set out.

The brief in support of this petition begins at Page 15.

I

Judgment Below

The judgment sought to be reviewed became final on September 25, 1946, and appears at Page 48 of the record.

II

Statement of the Matter Involved

This is a suit instituted by Petitioners in one of the District Courts of Bexar County, Texas, to contest a $5,700,000.00 bond election. There are no controverted issues of fact in the points presented. On July 26, 1945, the City of San Antonio, a Home Rule City, annexed the adjacent areas of Terrell Hills and Olmos Park, and provided that from and after July 26, 1945, these two areas shall be a part of, and subject to the jurisdiction, ordinances, and taxes of, the City of San Antonio (R. 26, 10, 13). The Charter of the City of San Antonio provided that the City shall have power, by ordinance, to annex adjacent territory and that the inhabitants of annexed territory shall be entitled to all the rights and privileges of all other citizens of the City of San Antonio (R. 26, 28; Exhibit 26, Page 4, Par. 2).

On September 25, 1945, the City of San Antonio held a special bond election upon twenty-two separate propositions to borrow money on the credit of the City of San Antonio, and to issue the bonds of said city and to levy taxes for the payment of the interest and provide a sinking fund for the redemption of such bonds at maturity (R. 25, 38-9). Seventeen of the propositions voted upon at the election were defeated (R. 39). The highest majority received by any one of the remaining five bond propositions voted on in said election was 878, and the lowest majority 30 (R. 39).

Petitioners were qualified electors who owned taxable property in the City of San Antonio which will be subject to the additional tax sought to be imposed by the election of September 25, 1945 (R. 19, 28).

Petitioners conclusively established in the trial court that at least 933 qualified electors resided in the annexed

areas of Terrell Hills and Olmos Park just prior to and on September 25, 1945 (R. 21, 22, 29-31), and that these electors were, as a class, denied the right to vote in said election (R. 36, 37, 22). The Court of Civil Appeals found that there were "enough qualified voters living in these territories (Terrell Hills and Olmos Park) to have changed the result of the election" (R. 39). This class of disfranchised electors exceeded the majority received by any one of the several bond issue propositions voted on in said election (R. 39).

Respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio (R. 34, 33, 16), but refused to permit the electors residing therein to vote because they had not resided within the limits of the City of San Antonio for six months preceding the date of the election (R. 35-36). This contention was based upon Sections 2 and 3 of Article 6 of the Constitution of the State of Texas, which require a qualified elector in a municipal bond election to have resided in the State for one year and within the corporate limits of the City for six months next preceding the election. Each of the 933 disfranchised electors had resided in the State for one year and in the annexed area for more than six months preceding September 25, 1945 (R. 21, 22, 39).

If the bonds are issued, the taxes of the property owning electors residing in the annexed towns of Terrell Hills and Almos Park will be increased (R. 34, 35).

It was Petitioners' contention in the trial court that all of the qualified electors who had resided in the State for one year and in the annexed areas for six months, immediately preceding September 25, 1945, were entitled to vote in the election, since, in determining the residential qualifications of electors, the law considers the period of time they had resided in the annexed areas (R. 3-9); and that the dis-

franchisement of this class of qualified electors was in contravention of the Fourteenth Amendment and resulted in depriving Petitioners of their property without due process of law (R. 8).

The trial court sustained Respondent's contention, and held that the electors residing in the annexed areas were properly not permitted to vote because they had not actually resided within the corporate limits of the City of San Antonio for six months preceding the election (R. 24), and rendered judgment against Petitioners (R. 17-18).

There was no question or issue raised by Respondent, either in the trial court or in the Court of Civil Appeals, as to the validity of the annexation of the towns of Terrell Hills and Olmos Park (R. 16). On the contrary, Respondent, who was the Mayor of the City of San Antonio (R. 19, 28), testified that municipal services were being furnished to, and accepted by, the annexed areas (R. 34), and, "we are asserting in this Court that they (Terrell Hills and Olmos Park) are a part of the city" (R. 34).

Terrell Hills and Olmos Park instituted identical suits contesting the right of the City of San Antonio to annex said towns (R. 20, 21, 39, 71). Respondent and the City of San Antonio were defendants in said suits (R. 39, 72). Petitioners were not parties to these two suits.

Subsequent to the perfection of Petitioners' appeal to the Court of Civil Appeals (R. 18, 31), the two annexation cases were heard in the trial court, and identical judgments were there rendered enjoining the City of San Antonio from asserting authority over the former towns of Terrell Hills and Olmos Park (R. 39, 71, 74). Appeals were perfected by Respondent and the City of San Antonio in each of these annexation cases to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, where they were numbered and styled as follows: No. 11,619, *City of San Antonio* v. *State, ex Rel., Town of Almos Park;* and No.

11,620, *City of San Antonio* v. *State, ex Rel., Town of Terrell Hills* (R. 39, 71-2), and consolidated (R. 71).

Petitioners will hereafter refer to said annexation suits by the number they bore in the Court of Civil Appeals—No. 11,619 and No. 11,620; and to this bond election suit by No. 11,612—the number it bore in the same court.

Cause No. 11,612 (the election contest) was submitted and argued in the Court of Civil Appeals on March 27, 1946. On March 30, 1946, while the Court of Civil Appeals had Cause No. 11,612 under consideration, and before Causes No. 11,619 and No. 11,620 had been submitted, briefed or argued, Respondent and the City of San Antonio filed in Causes No. 11,619 and No. 11,620, identical documents denominated "Appellants' Motion to Affirm Judgment," in which Motions Respondent and the City of San Antonio stipulated and agreed that the annexation ordinances of July 26, 1945, were null and void, and that the judgments rendered by the Trial Court in Causes No. 11,619 and No. 11,620, were correct and should be affirmed, and also reformed so as to declare the annexation ordinances "void" (R. 56, 59). The Appellees in said Causes No. 11,619 and No. 11,620 joined in said Motions (R. 58, 60, 72). Petitioners contend that these Motions were void and collusive as a matter of law.

Upon the filing of said Motions to Affirm Judgment, Petitioners' attorneys moved the Court of Civil Appeals to grant them leave to file an *Amicus Curiae* Reply to said Motions To Affirm Judgment, and in said Reply questioned the motives and good faith of Respondent in filing said motions, and suggested to the Court that it should not permit the parties to Causes No. 11,619 and No. 11,620 to stipulate that an ordinance was unconstitutional, and should not grant said Motions to Affirm Judgment, for the reason that the City of San Antonio was a public body and the questions involved in said causes were of public interest;

that persons not parties to the record were interested in, and will be affected by, the litigation, and that Respondent should not be permitted to abandon or confess away the rights of the public without a judicial determination of the validity of the annexation ordinances; and consequently, said causes should be disposed of by the Court of Civil Appeals on their merits, and not by stipulations which had the purpose and effect of attempting to barter away the rights of the citizens of San Antonio and to perpetuate an erroneous judgment and to prevent the Court of Civil Appeals from passing on the merits of the legal issues as made (R. 61-70). Petitioners' Motion for leave to file an *Amicus Curiae* Reply to said Motions to Affirm Judgment was denied.

On April 10, 1946, the Court of Civil Appeals granted said Motions to Affirm Judgment, and reformed the judgment of the trial court so as to declare the ordinances of July 26, 1945, annexing the former towns of Terrell Hills and Olmos Park to be "void". In the course of its opinion in said causes, the Court of Civil Appeals stated that it follows the practice of granting Motions which are agreed to by the parties to a suit, and concluded:

> "*We are not here called upon to decide whether or not the judgments involved are impervious to any possible attack that might be lodged against them.* Appellants, by filing the Motions which they did file, have waived the right to present assignments or points of error. *These* cases (No. 11,619 and No. 11,620) *are before us without specific specifications of error.* To the contrary, Appellants state that the judgments of the trial court are correct" (R. 71-75).

On the same date, April 10, 1946, the Court of Civil Appeals, in Cause No. 11,612 (the election contest), affirmed the judgment of the trial court, and in the face of its finding that there were enough qualified voters living in the

annexed territory to have changed the result of the election, overruled Petitioners' contention that the bond election of September 25, 1945, was void by reason of the disfranchisement of the qualified electors residing in the annexed areas, and held that since the parties to Causes No. 11,619 and No. 11,620 had agreed and stipulated that the ordinances annexing the former Towns of Terrell Hills and Olmos Park were "null and void", and since the Court of Civil Appeals had entered judgment in said causes in conformity with the stipulations and agreements of the parties in said causes (R. 38-9) and,

> "As there are now upon the minutes of this Court a judgment decreeing the ordinances which attempted to annex the cities of Olmos Park and Terrell Hills to be null and void, we hold that the voters residing in such territory were properly not permitted to vote in a bond issue election in the City of San Antonio. No. 11,619, City of San Antonio *v.* State, ex rel. Town of Olmos Park; No. 11,620, City of San Antonio *v.* State, ex rel. Town of Terrell Hills" (R. 38-9).

The action of the Court of Civil Appeals, after finding that there were "enough qualified voters living in these territories to have changed the result of the election", in holding that the voters residing in the annexed territory were properly not permitted to vote in the bond election because of the agreed judgments entered in Causes No. 11,619 and No. 11,620, ascribed to these void judgments the binding force and effect of *res judicata,* and deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment. *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 453, 281 U. S. 673.

Since Petitioners were not parties to Causes No. 11,619 and No. 11,620, they were not in the position to show that the annexation ordinances were in all things valid, and that the Statutes authorized the annexations (See Appendix, P. 32). Petitioners were precluded from having the invalidity of the election determined on the basis of the disfranchisement of qualified electors as a class; on the contrary the issue was foreclosed by the Appellate Court ascribing *res adjudicata* effect to an *agreed judgment* between third parties (to which Petitioners were not parties) that the annexation ordinances were void; bonds will be issued and Petitioners' property will be burdened with taxes to pay the principal and interest of bonds issued pursuant to a void election,—and the invalidity of which election the Appellate Court steadfastly refused to allow Petitioners to demonstrate, but binding them by the *agreed judgment* of third parties that the annexation ordinances were void—and since *"void by agreed judgment"* the areas were never lawfully annexed—and since not lawfully annexed the disfranchisement as a class of the qualified electors therein residing was harmless.

The Court of Civil Appeals could not assume that Petitioners had no defense against the judgment rendered in Causes No. 11,619 and No. 11,620. *Rees* v. *City of Watertown*, 19 Wall. 107, 123, 22 L. Ed. 72, 77; *Coe* v. *Armour Fertilizer Works*, 35 S. Ct. 625, 629, 237 U. S. 413.

Petitioners applied to the Supreme Court of Texas for a Writ of Error, which was denied by said Court, without opinion, with the notation "Refused. No Reversible Error" (R. 77-89). Petitioners' Motion for Rehearing in said Court was overruled on September 25, 1946 (R. 89, 96). All remedies in the State Courts have been exhausted. Under the law of Texas, the effect of the order of the Supreme Court of Texas refusing Petitioners' Application for Writ of Error is to make the judgment of the Court of Civil Ap-

peals final. Texas Rules of Civil Procedure, Rule 483, as amended February 1, 1946. (See Appendix, P. 32).

The Court of Civil Appeals thus became, in this case, the highest Court of the State in which a decision could be had. See, *Bacon* v. *State of Texas,* 163 U. S. 207, 16 S. Ct. 1023.

The opinion of the Court of Civil Appeals in Causes No. 11,619 and No. 11,620 appears in 195 S. W. (2) 421; and the opinion in the instant case appears in 195 S. W. (2) 422.

The federal matters involved in this case are:

(1) Whether a state court may permit third parties to a suit to stipulate that a certain ordinance is void, and enter judgment based on such stipulation without having judicially determined that such ordinance is in fact void, and thereafter ascribe to such a judgment the binding force and effect of *res judicata* and conclusive of the rights of Petitioners even though they were not parties to said suit or stipulation; *Postal Teleg. Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673; *Kelley* v. *Town of Milan,* 8 S. Ct. 1101, 1111, 127 U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 11 S. Ct. 402, 138 U. S. 552; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289.

(2). Whether a state court may base its decision on a point not presented or argued by the Respondent, and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence. *Le Tulle* v. *Scofield,* 60 S. Ct. 313, 308 U. S. 415; *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 509, 217 U. S. 257; *Postal*

Telegraph Cable Co. v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464.

III

Statement of the Basis of the Jurisdiction of This Court

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Judicial Code, Sec. 237(b), as amended by the act of February 13, 1925, 28 U. S. C. A. Sec. 344(b), 43 Stat. 937, reading in part:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination,—any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had—where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution—of the United States;"

The Federal Constitutional issues were properly preserved. The judgment of the Court below became final on September 25, 1946 (R. 48, 96) and this petition is filed within three months thereafter.

IV

The Questions Presented

The questions presented to this Court are:

> (1). May an Appellate Court render a judgment in one case that a municipal ordinance is void, without a judicial determination to that effect, but based solely on a stipulation by the parties to that suit, and thereafter make said stipulation and agreed judgment binding upon, and *res adjudicata* of, the rights of third parties in another suit who were not parties to the stipulation?

(2). Whether the Court of Civil Appeals, by its adjudication that Petitioners are bound by a judgment rendered in an earlier litigation to which they were not parties, and which earlier judgment was based upon a void stipulation of the parties as to the invalidity of an ordinance, has deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment.

(3). Whether Petitioners have been deprived of the due process of law guaranteed by the Fourteenth Amendment by the action of the Court of Civil Appeals in deciding the case on a point not presented or argued by Respondent, either in the Trial Court or Court of Civil Appeals, and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence.

(4). May a city annex adjacent territory and thereafter refuse to permit the qualified electors, residing therein for more than six months, to vote in a special election which will impose taxes on their property, because these electors had not lived within the original city limits for six months preceding the election?

The first, second, and third questions, being predicated on the action of the Court of Civil Appeals, were urged in that Court in Petitioners' Motion for Rehearing (R. 49-76), which was overruled by the Court of Civil Appeals (R. 49).

The fourth question was raised in the District Court of Bexar County (R. 3-9), which was overruled (R. 24). This point was reurged in the Court of Civil Appeals by Points of Error 1 and 8 in the brief filed in that Court (R. 37-8), and reurged in said Court in a motion for rehearing (R. 49-50) which was overruled (R. 49).

Petitioners then filed in the Supreme Court of Texas an application for Writ of Error, again raising each of the

questions (R. 77-88), which was "refused" (R. 89). Each of the issues was again raised in the Supreme Court of Texas by a Motion For Rehearing (R. 89-95), which was overruled on September 25, 1946 (R. 96).

V

Reasons Relied upon for Allowance of the Writ of Certiorari

A substantial federal question presents itself with respect to the right of a State Court to hold the Petitioners bound by a private stipulation of parties to another lawsuit that a certain ordinance was void. This Court has held that when the judgment of a State Court, ascribing to the judgment of another Court the binding force and effect of *res judicata,* is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673. This salutary principle becomes basic when the first judgment is based not upon a judicial determination of the State Court, but upon a private stipulation of the parties. In such case, there has been no judicial determination or submission of the question to the Court for a decision on its merits, but merely a consent, in advance, to a particular decision; and such judgment cannot be set up as a judicial determination of the invalidity of the annexation ordinances. *Kelley* v. *Town of Milan,* 8 S. Ct. 1101, 1111, 127

U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 11 S. Ct. 402, 138 U. S. 552; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402

The decision of the Court of Civil Appeals that the qualified electors residing in the annexed areas were properly not permitted to vote in the election was based upon a point not presented, relied upon, argued or urged by Respondent; and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence. On the contrary, Respondent contended in the Trial Court and in the Court of Civil Appeals that the annexation ordinances were valid, and that the annexed areas were part of the City of San Antonio. Such a procedure also fails to accord Petitioners due process of law. *Le Tulle* v. *Scofield,* 60 S. Ct. 313, 308 U. S. 415. The action of the Court of Civil Appeals in this respect was substantially to deny the Petitioners their day in Court—they were condemned without affording them an opportunity to be heard. *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 509, 217 U. S. 257. The principle underlying all administration of justice is that no proceedings shall take place in Court affecting the rights of anyone without affording him an opportunity to be heard. *Postal Teleg. Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 570, 247 U. S. 464; *Railroad Commission of Calif.* v. *Pacific Gas Electric Co.,* 58 S. Ct. 334, 338, 302 U. S. 388.

The Court of Civil Appeals could not assume that Petitioners had no defense against the agreed judgment rendered in Causes No. 11,619 and No. 11,620. "To assume that he (Petitioners) has none, and therefore, that he is entitled to no day in Court, is to assume against him the very point he may wish to contest." *Rees v. City of Watertown,* 19 Wall. 107, 123, 22 L. Ed. 72, 77. "To one who protests against the taking of his property without due process of

law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees *v.* Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77." *Coe* v. *Armour Fertilizer Works,* 35 S. Ct. 625, 629, 237 U. S. 413.

The action of the Court of Civil Appeals is not in accord, and conflicts, with applicable decisions of this Court on the federal questions of substance raised by Petitioners.

In the accompanying brief, the issues supporting Petitioners' claims and contentions are more fully stated and considered and said brief is referred to in aid thereof.

WHEREFORE, Petitioners pray that in the exercise of its discretion, this Court issue its Writ of Certiorari to review the decision herein of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, and for such other orders as may be appropriate; that the said judgment of the Court of Civil Appeals be reversed, and your Petitioners have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The Supreme Court of Texas did not write an opinion in this cause. The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas is reported in 195 S. W. (2) 422. The opinion is also printed in full in the record (R. 38).

II

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 344 (b), 43 Stat. 937.

The judgment of the Court of Civil Appeals, herein sought to be reviewed, became final on September 25, 1946 (R. 48, 96).

As more particularly set out in the foregoing petition for certiorari, the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas (the highest Court of the State in which a decision could be had) involved substantial Federal questions:

(1). Whether the Court of Civil Appeals, by its adjudication that Petitioners in this case are bound by the void stipulation of parties to another lawsuit as to the invalidity of an ordinance, has deprived them of the due process of law guaranteed by the Fourteenth Amendment. *Postal Teleg. Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464; *Hansberry* v. *Lee*, 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson*, 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill*, 50 S. Ct. 451, 281 U. S. 673.

(2). Whether the action of the Court of Civil Appeals in basing its decision on a point not presented or argued by the Respondent either in the Trial Court or Court of Civil Appeals, and which Petitioners had never had an opportunity to meet by the production of law or evidence, has deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment. *Le Tulle* v. *Scofield*, 60 S. Ct. 313; *Lutcher & Moore Lumber Co.* v. *Knight*, 30 S. Ct. 505, 509; *Postal Teleg. Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464.

(3). Whether the Court of Civil Appeals had the power, authority, or jurisdiction to bind Petitioners by a void stipulation of parties to another lawsuit that a municipal ordinance was void. *Kelley* v. *Town of Milan*, 8 S. Ct. 1101, 1111, 127 U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cot-*

ton Mills, 11 S. Ct. 402, 138 U. S. 552; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289.

The Court of Civil Appeals was in this case, the State Court of last resort. *Bacon* v. *State of Texas,* 163 U. S. 207, 16 S. Ct. 1023.

III

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition for certiorari (P. 2), and, in the interest of brevity, said statement is adopted hereunder and made a part of this brief.

IV

Specification of Errors

1

The Court of Civil Appeals erred in holding that the stipulations and agreements of the parties in Cause No. 11,619, styled City of San Antonio *v.* State, ex rel. Town of Olmos Park, and No. 11,620, styled City of San Antonio *v.* State, ex rel. Town of Terrell Hills, as to the unconstitutionality of the annexation ordinances, were binding upon Petitioners, and consequently, the voters residing in the annexed territory were properly not permitted to vote in the bond issue election held in the City of San Antonio on September 25, 1945. Parties to litigation cannot agree upon the unconstitutionality of an ordinance, and the Court of Civil Appeals had no authority to accept and act upon such an agreement. To uphold such agreements would permit litigants to privately nullify any valid enactment of a legislative body.

2

The Court of Civil Appeals erred in rendering judgment in said Causes No. 11,619 and No. 11,620, based upon the agreements and stipulations of the parties as to the unconstitutionality of the annexation ordinances, and thereafter make said agreed judgment binding upon Petitioners, without first having judicially inquired into and determined that the law as agreed to between the parties was, in fact, the law of the State of Texas. It was beyond the power of Respondent and the officials of the City of San Antonio, by stipulation, to divest the City of a right which it had under its Charter and the Constitution and Statutes to annex territory by ordinance; and it was error for the Court of Civil Appeals not to disregard said stipulations and agreements. Petitioners were entitled to have their judicial rights determined by the laws of the land based upon judicial determinations, and not by a judgment based upon agreements and stipulations of parties to other lawsuits.

3

The Court of Civil Appeals erred in holding in the instant case that by reason of its judgment in Causes No. 11,619 and No. 11,620, the voters residing in the annexed areas "were properly not permitted to vote in the bond issue election in the City of San Antonio." The right of exercising the elective franchise was given to the citizens residing in the annexed areas by the Constitution and Statutes of the State of Texas—which right could not be taken away from them by a void judgment predicated on agreements and stipulations by parties to another lawsuit as to a Constitutional question. The action of the Court of Civil Appeals deprived Petitioners of their property and deprived the citizens of the annexed areas of the right

to vote in the bond election, in denial of the due process of law guaranteed by the Fourteenth Amendment.

4

The Court of Civil Appeals erred in basing its decision that the voters residing in the annexed areas were properly not permitted to vote in the election on a point not presented, urged or argued by Respondent, and which the Petitioners had never had an opportunity to meet by the production of law or evidence.

5

The Court of Civil Appeals erred in affirming the judgment of the District Court because the record conclusively shows that Respondent and the City of San Antonio disfranchised an entire class of qualified voters, which in number exceeded the highest majority received by any one of the bond propositions voted upon in the election, and thereby deprived Petitioners of their property without due process of law and imposed debts and burdens upon their property without due process of law, in violation of, and contrary to, the Fourteenth Amendment.

V

ARGUMENT

1

The Election Was Void

As stated by the Court of Civil Appeals, there were enough qualified voters living in the annexed territory to have changed the result of the election (R. 37). Since these qualified voters were disfranchised as a class (R. 36, 37, 22), this finding would make the election of September 25, 1945, void as a matter of law, but for the action of the Court of

Civil Appeals in binding Petitioners by the void proceedings in Causes No. 11,619 and No. 11,620 (R. 38-9, 48). *Ex Parte Kennedy*, 3 S. W. 114, Tex.; *Marsden* v. *Troy*, 189 S. W. 960, Tex.; *McCrary On Elections*, 4th Ed. Sec. 235, P. 176-177, Sec. 276, P. 208; 18 Am. Jur. Sec. 259, P. 350, Sec. 265, P. 354; 29 C. J. S. Sec. 211, P. 306; 16 Tex. Jur. Sec. 131, P. 17.

The finding and opinion of the Court of Civil Appeals that there were "enough qualified voters living in these territories to have changed the result of the election" is supported by the record and the law. The Trial Court found that there were at least 933 qualified electors residing in the annexed areas just prior to September 25, 1945 (R. 21, 22). And it is universally held that in determining the political qualifications of the residents of annexed territory, the law gives such residents the benefit of the period of time they had resided in the annexed area, for the reason that such citizens had done no act by which they should lose any of their political rights. *Gibson* v. *Wood*, 49 S. W. 768, Ky.; *Renner* v. *Bennett*, 21 Ohio St. 431; *Scott* v. *McColeman*, 107 N. W. 869, Mich.; *Meffert* v. *Brown*, 116 S. W. 779, Ky.; *McCrary On Elections*, Sec. 47, P. 37; *McCarthy* v. *Fitzgerald*, 32 N. W. 788; *Smith* v. *Patterson*, 242 S. W. 749, 750, Tex.

2

The Action of the Court of Civil Appeals in Binding Petitioners by the Void Proceedings in Causes No. 11,619 and No. 11,620 Was Void.

As stated by the Court of Civil Appeals there were enough qualified voters living in the annexed territory to have changed the result of the election; but notwithstanding such fact, the Court of Civil Appeals failed and refused to make a judicial determination on the question

of the validity of the election. The Court of Civil Appeals summarily, and without any warrant in law, abandoned its judicial function, and held that since the parties to the appeals in Causes No. 11,619 and No. 11,620 had agreed and stipulated to the entry of a judgment in the Court of Civil Appeals "so as to expressly decree the attempted ordinances of annexation null and void," said agreement and stipulation was binding upon Petitioners, and consequently the voters residing in the annexed territory were properly not permitted to vote.

While an Appellate Court may, perhaps, take judicial notice of, and ascertain the law as embodied in, one of its previous decisions and make application of such law in the determination of a case under consideration, this right, we most urgently submit, can only be exercised when the Court has previously in fact *judicially determined and judicially declared* the status of the law of the case it seeks to use as precedent. In the absence of a judicial declaration of the law by the Court of Civil Appeals in Causes No. 11,619 and No. 11,620, the opinion and judgment of the Court of Civil Appeals in said causes is not a conclusive, authoritative or binding appellate court decision; it did not declare the law of the case; it was not a judicial determination by the Court of the status of the law; it was not binding upon itself or upon any inferior court in any subsequent litigation involving the annexation ordinances; it did not become a part of the law of the State, and it is no authority on the question of the validity or invalidity of the annexation ordinances.

Whether or not the annexation ordinances were valid and constitutional was a question of law, and the parties to Causes No. 11,619 and No. 11,620 had no legal right to agree and stipulate that said ordinances were void and unconstitutional; and neither did the Court of Civil Appeals have the power, authority, or jurisdiction to accept and act upon

said agreement and stipulation without an independent examination of the record and the law, and a judicial determination of said question. Especially, when the Court of Civil Appeals was informed that the subject matter of the stipulation, and a decision based thereon, would necessarily affect the substantial interests of the general public and of third persons not parties to said causes.

Petitioners submit that the judgment in causes No. 11,619 and No. 11,620 was the unauthorized and void act of the respondent and Commissioners of the City of San Antonio, and not the judicial act of the Court of Civil Appeals. The City of San Antonio is not bound by such void judgment, for it cannot be shorn and stripped of its governmental and legislative powers and functions by such a proceeding; and neither were Petitioners bound by such proceedings.

In *Kelley* v. *Town of Milan*, 127 U. S. 139, 8 S. Ct. 1101, 1111, the Mayor and Aldermen of Milan, a municipal corporation in Tennessee, had instituted suit against the Mississippi Ry. Co. to enjoin the collection of certain bonds issued by the town of Milan. At the trial, the Mayor and Aldermen stipulated that the bonds were valid, and a judgment was entered accordingly. In a subsequent suit by a third party involving the subject matter, this judgment was interposed as a defense. The Court, in holding the stipulation and the judgment based thereon to be ineffective, said:

> "This was no adjudication by the Court of the validity of the bonds, on the submission to it, as a judicial tribunal, of the question of such validity. The declaration of the validity of the bonds, contained in the decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the New Orleans, St. Louis & Chicago Railroad Company. * * * The adjudication in the decree cannot, under the circumstances, be set up as a *judicial determination* of the

validity of the bonds. Russell *v.* Place, 94 U. S. 606; Insurance Co. *v.* Broughton, 109 U. S. 121, 125, 3 Sup. Ct. Rep. 99. *This was not the case of a submission to the Court of a question for its decision on the merits, but it was a consent, in advance, to a particular decision,* by a person who had no right to bind the town by such a consent."

To the same effect see: *Chicago Grand Trunk Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402, 143 U. S. 339; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 243 U. S. 281; *Case* v. *Los Angeles Lumber Co.,* 60 S. Ct. 1, 6, 308 U. S. 106; *Sanfords Estate* v. *Commissioner of Internal Revenue,* 60 S. Ct. 51, 59, 308 U. S. 39.

In *City of St. Paul* v. *Chicago St. P. M. & O. Ry. Co.,* 166 N. W. 335, Sup. Ct. Minn., litigation arose between the City of St. Paul and certain railroads as to who had the duty of repairing a certain bridge. While the litigation was pending, the City Council passed an ordinance for the purpose of settling the litigation, and provided that "The corporation attorney is hereby authorized and directed to stipulate for, and procure the entry of, final judgment to the effect that no duty rests upon either or any of said railway companies to maintain or keep in repair the bridge described in said proceedings * * *." In compliance with this ordinance, the City Attorney entered into a stipulation with the Defendant railroads which called for a judgment against the City. In a subsequent suit over the same subject matter, the Defendant relied on the agreed judgment theretofore entered in conformity with the stipulations. The Court held that stipulations affecting "public interests" are not binding upon the Court, and since the judgment was entered "*without findings of any kind,*" but entered pursuant to a stipulation of the officers of the City, it "*was not rendered as the judicial act of a Court,*" and "*the judgment as well as the stipulation is void;*" citing *Kelley* v. *Milan,*

127 U. S. 139, 8 Sup. Ct. 1101, 32 L. E. 77; *Bank* v. *Commissioners,* 119 N. C. 214, 226, 25 S. E. 966; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005.

In a previous case, involving the same stipulation, *State ex rel. City of St. Paul* v. *Great Northern Ry. Co.,* 158 N. W. 972, 975, the Court held:

> "*This judgment was the act of the parties, not the act of the Court;* and whatever effect such a judgment might have upon the personal rights of parties thereto who possessed the power to make such an agreement, neither the State nor the governmental agencies of the State can be shorn of their governmental powers by any such device."

The annexation ordinances were not the private property of the Respondent and Commissioners of the City of San Antonio, to be confessed and bartered away whenever it became politically expedient for them to do so.

In *National Bank of Colchester* v. *Murphy,* 50 N. E. (2) 748, 749, Sup. Ct. Ill., the Court said:

> "This case involves important public questions. *In such cases the parties may not stipulate away the rights of the public.* No valid stipulation or agreement, as to questions of law or the legal effect of facts, can be made by the parties. *People ex rel. Reinhart* v. *Herrin,* 284 Ill. 368, 120 N. E. 274, 276. In that case it was said: '*It is the duty of the Court to determine whether a law is constitutional or not. Courts cannot declare legislative acts unconstitutional on an agreed statement of facts.* Chicago Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176. Neither can they stipulate the legal effect of admitted facts. Swift and Co. *v.* Hocking Valley Ry. Co., 243 U. S. 281, 37 S. Ct. 287, 61 L. E. 722. *A public law is not the property of any Court and cannot be confessed away.*" Citing cases.

And in *State ex rel. McCuffery* v. *Aloe*, 54 S. W. 494, 495, Mo., it was held:

> "*A public law is not the property of any man, and cannot be confessed away.* When the judiciary undertakes to pass judgment on an act of the legislature in the light of the Constitution, it exercises the highest function of government known under our free institutions. In such cases parties and counsel may aid the Court in its search for truth, both as to facts and law, *but the responsibility for its findings and conclusions is upon the Court alone.* * * * *A judgment of invalidity of a statute could not be predicated on an admission.* * * *"

Petitioners submit that the stipulations of the parties in Causes No. 11,619 and No. 11,620, did not relieve the Court of Civil Appeals of its judicial function of determining whether the annexation ordinances were constitutional. The public interest that a result be reached in public matters which promotes a well-ordered society is foremost in every suit in which the public is, in effect, a party. Such public interest is entrusted to the Court's consideration and protection, as well as those public officials seeking to confess error in a matter in which the public is vitally concerned. The proper administration of law cannot be left merely to the stipulation of the parties in public matters, since such parties might, and often do, disregard, or are in error as to, the rights of the public. See in this connection, *Young* v. *United States*, 62 S. Ct. 510, 315 U. S. 257. Manifestly, to uphold an agreement that an act is unconstitutional would permit litigants to deliberately nullify any valid enactment of a legislative body. *State* v. *Thomason*, 221 S. W. 491, 495, Tenn.; *Humard Const. Co.* v. *City of Middlesboro*, 36 S. W. (2) 38, 40, Ky.

The following additional authorities are cited in support of our contention that parties to a suit may not stipulate

that an ordinance or statute is void or unconstitutional: *State, ex rel., Sullivan* v. *Schnitger,* 95 Pac. 698, 701, Wyoming; *Atty. General* v. *Rice,* 31 N. W. 203, 206, Mich.; *State Consol. Pub. Co.* v. *Hill,* 4 Pac. (2) 668, 669, Arizona; *In Re Fahnestocks Estate,* 50 N. E. (2) 733, 735, Ill.; *North Platte Lodge* v. *Bd. of Equalization,* 252 N. W. 313, 92 A. L. R. 658, Neb.; 11 Am. Jur. Sec. 127, P. 775; 37 Am. Jur. Sec. 169, P. 799; 3 Am. Jur. Sec. 819, P. 361; 50 Am. Jur. Sec. 4, P. 607.

3

The Action of the Court of Civil Appeals Deprived Petitioners of the Due Process of Law Guaranteed by the Fourteenth Amendment.

We submit that the action of the Court of Civil Appeals in binding Petitioners by the void judgment entered in Causes No. 11,619 and No. 11,620, is contrary to due process of law. Petitioners were not parties to said suits; though they sought to be heard therein through *Amicus Curiae* proceedings, they were denied that right; though they attempted to let the Court of Civil Appeals know that the Respondent and Commissioners of the City of San Antonio had no right to confess away the interests of the City of San Antonio, they were denied the right to speak; though they importuned the Court of Civil Appeals to pass on the merits of Causes No. 11,619 and No. 11,620 and sought to file a brief to assist the Court, they were ignored. Yet, the Petitioners were condemned by the Court of Civil Appeals. The action of the Court of Civil Appeals in this cause wants all the attributes of a judicial determination and cannot be upheld.

"Due process of law requires a judicial determination of the issues." 16 C. J. S. Sec. 616, P. 1241. But this record discloses that the Court of Civil Appeals expressly held in Causes No. 11,619 and No. 11,620, that it was not

judicially determining that the annexation ordinances were void, but was entering a judgment based upon the agreements and stipulations of the parties (R. 56, 59, 71, 74, 75). Petitioners were not parties to said causes, and Respondent at no time contended in this cause that the annexation ordinances were void, but on the contrary at all times contended that the annexation of Olmos Park and Terrell Hills was valid (R. 34).

By reason of the void stipulation and agreement of the parties in causes No. 11,619 and No. 11,620, and the entry of the void judgment based on said stipulation, the Court of Civil Appeals failed and refused to pass upon Petitioners' contention that the election was void because of the disfranchisement of the qualified electors residing in the former towns of Terrell Hills and Olmos Park.

In *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 247 U. S. 464, the State Court, as in the instant case, declined to pass on the issues raised by the Petitioner, deeming that Petitioner was concluded upon the issues by the consent of other parties to a prior suit (Page 569 of opinion). The Court held, Page 570, that:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R. R. *v.* United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Greenl. Ev. §§ 522, 523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor *v.* McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914; Louisville & Nashville R. R. Co. *v.* Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747; Simon *v.* Craft, 182 U. S. 427, 436, 21 Sup. Ct. 836, 45 L. Ed. 1165. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in

> the proceedings without a hearing or an opportunity to be heard (Pennoyer *v.* Neff, 95 U. S. 714, 733, 24 L. Ed. 565; Scott *v.* McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896; Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 423, 35 Sup. Ct. 625, 59 L. Ed. 1027), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

The action of the Court of Civil Apeals in binding Petitioners by the void judgments entered in Causes No. 11,619 and No. 11,620, has deprived them of the due process of law guaranteed by the Fourteenth Amendment. "The right to be heard in the Appellate Court is as valuable and as fundamental to an aggrieved party as is the right to be heard in the Trial Court." *Burrage* v. *Hunt Production Co.,* 114 S. W. (2) 1228, 1235, Pars. 13, 14.

In *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32, Mr. Justice Stone stated, "The question is whether the Supreme of Illinois, by its adjudication that Petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment." And, in answering this question, held:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded

> such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261, 273, 35 S. Ct. 37, 40, 59 L. Ed. 220."

And in *Truax* v. *Corrigan*, 42 S. Ct. 124, 129, 257 U. S. 312, it was held:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

Petitioners' Motion For Rehearing in the Court of Civil Appeals (R. 49-76) raised the fundamental issue that the action of the Court of Civil Appeals in binding Petitioners by the void action of said Court in Causes No. 11,619 and No. 11,620 transgressed the due process clause of the Fourteenth Amendment. This federal claim was timely made and was raised at the first opportunity. The Supreme Court of Texas refused Petitioners' Application For Writ of Error, without opinion or hearing (R. 89). Petitioners submit that in this regard they have been denied "due process of law"—an opportunity to be heard and to defend their substantive rights. The effect of the judgment of the Court of Civil Appeals is to deprive Petitioners of property without affording them at any time an opportunity to be heard in their defense. They asserted an invasion of their substantive right under the Federal Constitution,—to due process of law. If the judgment of the Court of Civil Appeals is permitted to stand, deprivation of Petitioners' property is accomplished without their ever having an opportunity to defend against the void proceedings and judgment entered in Causes No. 11,619 and No. 11,620.

The judiciary is not immune from transgression of the due process clause of the Fourteenth Amendment. The Federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. While the Courts of the State of Texas have the power to interpret and declare the written and unwritten laws of the State, Petitioners must be accorded due process in the primary sense —an opportunity to present their case and be heard in their support. While it is the right and duty of the Courts of the State of Texas to determine the adjective as well as the substantive law of the State of Texas, they must, in so doing, accord Petitioners due process of law. *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673.

As stated in 16 *C. J. S.*, Sec. 622, P. 1265:

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement, and this doctrine applies to every Court and to all kinds of judicial proceedings."

Further, the decision of the Court of Civil Appeals that the voters residing in Olmos Park and Terrell Hills were properly not permitted to vote in the bond issue election in the City of San Antonio, was based on a point not presented, relied upon, or urged by Respondent; and which the Petitioners had never had or been accorded an opportunity to meet by the production of evidence or law. Such a procedure also fails to accord Petitioners due process of law. *Le Tulle* v. *Schofield,* 60 S. Ct. 313, 308 U. S. 415. The action of the Court of Civil Appeals in this regard was substantially to deny to the Petitioners their day in Court—they were condemned without affording them an opportunity to be heard. *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 217 U. S. 257. The principle underlying all administra-

tion of justice is that no proceedings shall take place in court affecting the rights of anyone without affording him an opportunity to be heard.

Conclusion

The judgment of the Court of Civil Appeals is fundamentally wrong, is in conflict with decisions of this Court, and is in disregard of the requirement of due process.

WHEREFORE, Petitioners pray that in the exercise of its Discretion, this Court issue its Writ of Certiorari to review the decision herein of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, and for such other orders as may be appropriate; that the said judgment of the Court of Civil Appeals be reversed, and your Petitioners have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

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APPENDIX

From Vernon's Texas Revised Civil Statutes of 1925:

"Art. 1175. Enumerated Powers.

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * * * * * *

(2). The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter."

From Texas Rules of Civil Procedure:

"Rule 483. Order on Application for Writ of Eror.

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects had correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'"